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Supreme Court of the United States

October Term, 1940

No. 654

Department of Treasury of the State of Indiana, M. Clifford Townsend, Peter F. Hein, Lawrence F. Sullivan, as and constituting the Board of Department of Treasury of the State of Indiana,
Petitioners,

vs.

The Wood Preserving Corporation,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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Department of Treasury of the State of Indiana, M. Clifford Townsend, Peter F. Hein, Lawrence F. Sullivan, as and constituting the Board of Department of Treasury of the State of Indiana,
Petitioners,

vs.

The Wood Preserving Corporation,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

Opinion Below

The opinion of the Circuit Court of Appeals (R. 70-82) is reported in 114 F. (2d) 922.

Jurisdiction

The judgment of the Circuit Court of Appeals was entered July 20, 1940 (R. 83). A petition for rehearing was filed August 2, 1940, and was denied October 5,

1940 (R. 84). The jurisdiction of this Court is invoked under Sec. 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, 28 U. S. C. A. Sec. 347.

Questions Presented

The statement of "Contested Issues" in the petition (pp. 2-3) does not correctly present the questions here involved. It is based upon inferences of fact not justified by the findings and is argumentative. The questions presented, as found by the Circuit Court of Appeals (R. 73; 114 F. (2d) 922, 924-925), are correctly stated thus:

1. Whether the gross income taxes herein sought to be recovered are invalid as in violation of the due process clause of the 14th Amendment to the Federal Constitution, because laid upon a taxable event—the receipt of gross income—which occurred outside the territorial limits of Indiana and beyond the jurisdiction of the taxing authorities.

2. Whether the gross income taxes herein sought to be recovered are invalid as in violation of the due process clause of the 14th Amendment to the Federal Constitution, because laid without allocation or apportionment upon business activities both without and within the territorial limits of Indiana and, as to activities outside the state, beyond the jurisdiction of the taxing authorities.

3. Whether the gross income taxes herein sought to be recovered are invalid as in violation of the commerce clause, Article I, Section 8, of the Federal Con-

stitution, because laid upon receipts derived from interstate commerce, constitute a direct burden upon such commerce and are of a type which subjects the commerce to the risk of multiple taxation of like kind in other states.

Each of said questions presents a separate and distinct issue, entirely independent of the others. The Circuit Court of Appeals considered each question separately, and decided each in favor of respondent.

Title, Statute and Regulations

The title of the Indiana Gross Income Tax Act, and the pertinent provisions of the Act and regulations, are printed in the Appendix, *infra*, pp. 80-83. It was agreed in the stipulation, and carried into the findings, that material official regulations "may be judicially noticed by the Court" (F. 10, R. 48).*

Statement

The Circuit Court of Appeals in its opinion made an entirely accurate resume of the facts as stipulated by the parties and found by the District Court (R. 70-72). The statement of "The Facts" in the petition (pp. 3-8) is not correct. There are important omissions and inaccuracies which result in presenting a case quite different from that set forth in the findings of the District Court and decided by the Circuit Court

*NOTE—References in parentheses are to the findings of fact by number and to the record by page. Where used herein, F.—findings; R.—record; p.—page; l.—line; and RR—B. & O. Railroad.

of Appeals. Respondent deems it necessary to correct this, and for that purpose submits the following summary of the facts, as stipulated and found by the District Court (R. 20-58), with two parenthetical comments thereon by way of explanation:

Complete Condensed Statement of Facts

a. Respondent is a Delaware corporation, principal office at Pittsburgh, Pa. Branch office at Marietta, Ohio, from which its sale of ties is operated. Qualified to do business in Indiana, but maintains no office and has no property there. Has a designated agent in Indianapolis for service of process only. Has no regular agent or employee operating in the state, or residing there. Occasionally sends an agent into the state in connection with its tie business, who travels from, and reports to, the Marietta office. (R. 20, ll. 24-31; R. 48, ll. 16-22, and ll. 28-40.)

Respondent is engaged in the preservative treatment of timbers, including railroad ties (R. 20, ll. 31-33). It controls and operates two plants—one at Green Springs, W. Va.; the other at Finney, Ohio.

Respondent is also engaged in selling raw ties to railroads. (R. 20, l. 33.)

b. Respondent has two written contracts, and an oral supplemental agreement, with the B. & O. Railroad, a Maryland corporation, main office at Baltimore, Md. (R. 22, ll. 13-16.) They are:

(1) Contract with the Railroad for treatment of ties at the Finney, Ohio, plant. This is in the name of National Lumber & Creosoting Co., successor to Central Creosoting Co. (owner of the plant), and a subsidiary of and controlled by respondent. It requires the Railroad to deliver at least 600,000 ties annually to Finney for treatment. (R. 29 (c); R. 30, ll. 18-21; R. 38, ll. 10-21.)

Respondent acquired control of this contract and the plant "prior to the year 1933" * (R. 38, ll. 16-19), and thereafter was in position to enforce delivery of raw ties by the Railroad to the Finney plant.

(2) Contract for 5-year lease and operation of the Green Springs plant, owned by the Railroad. (R. 22-28.) This is called the Joyce-Watkins contract. This contract provides that:

Railroad *shall send all ties it wants treated to the Green Springs plant* (R. 23, ll. 1-3). All raw ties must be, and were, treated before use, under this contract. (R. 49, ll. 28-31.)

Respondent "*agrees to sell* to the Railroad all ties produced or purchased by it originating in territory" convenient to the Railroad's lines "to the extent that the Railroad may give orders for such ties." (R. 25, ll. 40-45.)

The Railroad *shall advise respondent* from time to time in writing *of ties needed*, when they are to be

*NOTE—All italics used in this brief are ours unless otherwise stated.

delivered and price to be paid to respondent f. o. b. cars on the Railroad's tracks. (R. 26, ll. 5-10.) Respondent "*will produce or purchase * * * the ties so ordered, and sell and deliver the same to the Railroad as ordered * * *.*" (R. 26, ll. 10-15.)

Respondent's margin of profit on ties purchased shall be as stated in the contract. (R. 26, l. 42, to R. 27, l. 6.) "All ties will be inspected by the Railroad's inspectors, *as loaded into the cars at point of origin.*" (R. 27, ll. 7-8.)

This contract respondent acquired by assignment from Joyce-Watkins Co. *on May 3, 1933.* (R. 28.)

(3) Supplemental agreement consisting of oral instructions, accepted and complied with. (R. 49, ll. 9-27.) The instructions *modified* that *provision* of Joyce-Watkins contract *requiring the Railroad to send all its raw ties for treatment to the Green Springs plant.* (R. 23, ll. 1-3.) These instructions were:

> "You will, of course, ship all ties originating at points on the B. & O. Railroad west of the Ohio River to Finney, Ohio; and ties originating east of the Ohio River to Green Springs, W. Va." (R. 49, ll. 21-24.)

c. Pursuant to Joyce-Watkins contract, the ties were furnished on requisition orders of Railroad from time to time. (R. 26, ll. 5-10.)

These orders were made from the Railroad's *Baltimore, Md., office* to respondent's *Marietta, Ohio, office* (R. 38, ll. 27-31), and *were acknowledged from the latter office.* (R. 38, ll. 32-35.)

(This closed the sale as to each batch of ties. *Respondent was then bound to obtain and deliver the ties,* and *Railroad was bound to buy them.* Nothing more remained to be done but delivery, and check of the ties by the Railroad against the specifications. The sales were completed outside the state.)

d. All ties furnished the Railroad out of Indiana, respondent obtained by purchase from local producers who supplied the ties at convenient loading points on the Railroad.

The purchase and sale arrangements were made *interstate* between respondent's Marietta, Ohio, office and producers in Indiana. (R. 38, ll. 35-40.) On receiving requisition orders from the Railroad, respondent sent specification and price list circulars to the producers. (R. 39). The producers, by phone, wire or mail, informed respondent at Marietta of the quantity and kind of ties they would furnish, and of the Railroad loading point where, and the time when, they would be ready. (R. 44, ll. 17-24.)

(*This,* under the regular course of business, *constituted a closed deal* between respondent and the producers. It was *a purchase and sale of all ties that met specifications.* The producer was paid for all such

ties, after inspection by the RR inspector.) (R. 45, ll. 16-21.)

e. When ties were ready at loading points, and freight cars were there, an inspector for Railroad and an agent of respondent sent from Marietta office met there. (R. 44, ll. 30-36.) The ties were inspected by the Railroad inspector "as loaded into the cars * * *" (R. 27, ll. 7-8.) *Loading and inspection were simultaneous.* Ties not meeting specifications were rejected.

f. After loading was completed, the Railroad inspector gave respondent's agent an inspection report showing quantity and kind of ties accepted and loaded. (R. 45, ll. 14-18.)

g. Respondent's agent made out a shipping report (R. 44, l. 37, to R. 45, l. 15), and also a *uniform type bill of lading*, showing respondent as consignor; Finney, Ohio, as the destination; and the Railroad (c/o its Chief Engineer of Maintenance), as consignee. (R. 45, ll. 26-28, and R. 48, l. 41, to R. 49, l. 5.) Copies of shipping report and bill of lading were sent to respondent's Marietta office, to its treatment plant at Finney, and to the Railroad at its Baltimore, Md., office. (R. 44, ll. 37-40, and R. 45, ll. 25-35.)

h. The car of ties was *then transported by the Railroad to the Finney, Ohio,* treatment plant. (R. 48, ll. 1-14.) No ties were ever diverted to any destination in Indiana or elsewhere. (R. 48, ll. 11-14; R. 49, ll. 25-27.)

i. Payment for ties was made from the Railroad's Baltimore office by check to respondent's Pittsburgh office. (R. 47, ll. 5-10.) No funds were ever received in Indiana. (R. 48, ll. 14-16.)

j. All ties sold the Railroad were required by the contracts to be shipped to one or the other of respondent's treatment plants. (*Supra*, pp. 5 (2)- 6 (3.))

Respondent sold no ties or timbers to any one except under contract that the ties should go to one of respondent's plants for treatment. (R. 20, l. 35, to R. 21, l. 5.)

k. The above-described steps constituted the uniform course of business during all the taxable years. (R. 49, ll. 32-36.)

Scope of Decision Below

The judgment of the Circuit Court of Appeals, as stated above, rests upon three separate grounds, each of which is distinct and independent of the others. If that Court was right as to any one of said grounds, its decision must, of course, be affirmed.

These separate grounds will, in the argument following, be dealt with in the same order as in the opinion of the Circuit Court of Appeals and as in petitioners' brief. The several reasons offered by petitioners for granting the writ will also be considered in connection with the particular ground of the judgment to which they refer.

Summary of Argument

Facts

During the taxable years 1934, 1935 and 1936, respondent, a Delaware corporation, main office at Pittsburgh, Pa., furnished cross-ties to Baltimore & Ohio Railroad Co., a Maryland corporation, main office at Baltimore, Md., under two written contracts and a supplemental agreement, all entered into outside of Indiana. One contract required the Railroad to deliver for treatment 600,000 ties annually to a treatment plant at Finney, Ohio, belonging (through a subsidiary) to respondent. The other provided, among other things, for the sale of raw ties to the railroad, delivered f. o. b. cars on the railroad's tracks; also for treatment of ties at another plant to be operated by respondent in West Virginia. The supplemental agreement required respondent to ship all ties delivered to the railroad in territory west of the Ohio River, including Indiana, to the plant at Finney, Ohio, for treatment. Respondent sold the railroad no ties that were not to be treated at one or the other of its plants before use. All of respondent's tie transactions were operated out of its branch office at Marietta, Ohio.

In Indiana, respondent itself produced no ties, but obtained them from local producers who supplied them at loading points on the railroad. When ties were ready, an inspector for the railroad, and an agent of respondent sent from respondent's office at Marietta, Ohio, met at the loading point; and as the ties were examined as to compliance with specifications, those

accepted by the railroad inspector were by the respondent loaded on freight cars furnished by the railroad at the loading point. The inspection and loading were simultaneous. Respondent paid the producer only for ties accepted by the railroad.

Respondent's agent made out bills of lading, with respondent as consignor, and the railroad's Chief Engineer of Maintenance at Finney, Ohio, as consignee. As cars of ties were loaded, they were carried under these shipping directions by the railroad to Finney. On reports sent in by respondent's agent, the Marietta office mailed weekly invoices to the railroad at its Baltimore office for ties sold and delivered to it, and made monthly reports of such invoices to respondent's main office at Pittsburgh. All payments for ties were made by the railroad by check from its Baltimore office to respondent's Pittsburgh office. These payments were deposited in respondent's Pittsburgh bank.

Respondent had no property in Indiana, maintained no office in Indiana, and no resident agent other than a statutory agent for service of process only. All bookkeeping functions were performed at its offices in Marietta and Pittsburgh. All gross receipts on which the tax here in question was assessed and collected were received by respondent from ties so furnished to the railroad.

During the entire taxable period, the practices and all proceedings followed the course of business indicated above and set out in detail in the Statement,

(*supra*, pp. 3-9.), and in the findings of the court at pages of the Record indicated in the Statement.

I

The tax imposed under the Indiana gross income tax law is an excise upon the privilege of receiving gross income. The taxable event is the receipt of gross income. No tax accrues from *the earning* of income or *when the income is due*. It can be assessed only after the income has been received.

The title of the Act limits its operation to "imposing a tax upon the receipt of gross income." Under the Constitution of Indiana, the provisions of an act cannot be extended beyond the scope of the specification in the title. No state court has construed the provision of Section 2 relied upon by petitioners with reference to the title of the Act. This Court has done so in the *Adams* case (304 U. S. 307, 309). In the administration of the Act, the provision relied on by the petitioners can be, and has been, given the full effect of its purpose without the construction now claimed by petitioners. The tax actually collected from non-residents, without the interpretation of Sec. 2 now urged by petitioners, has amounted to fourteen per cent of the total tax.* And a Department of Treasury regulation in force during the taxable period here involved (Reg. 16, Appendix, p. 83) definitely rejects and forbids such an interpretation. The gross income here was received by respondent at its main office in the State of

*See Footnote, *infra*, p. 28.

Pennsylvania. The tax was laid on the privilege of taking such receipts. As this privilege was exercised in and protected by the State of Pennsylvania, and not the State of Indiana, the latter state is without jurisdiction to impose the tax, and the collection of such is in violation of the due process clause of the 14th Amendment. (See Argument, *infra*, pp. 14-33).

II

If, as contended by petitioners, the tax is imposed on the privilege of transacting the business which is the source of the income, and the taxable event is the transaction of such business, the tax is still invalid, because it is imposed on the entire receipts from the business of furnishing ties, without apportionment, although the major part of the activities that lead to such receipts, and from which they are derived, occurred outside the State of Indiana. The tax thus laid on proceeds from activities both within and without the state, without being limited to those proceeds which represent proper allocation or apportionment of the activities within the state alone, is invalid as in violation of the due process clause of the 14th Amendment. (See Argument, *infra*, pp. 34-47.)

III

The tax is invalid in any event, because it is levied on gross receipts derived from interstate commerce, and is a type of tax which, if valid, subjects the commerce to the risk of taxes similar in substance that may be imposed in any state which the commerce touches,

and therefore violates the commerce clause of Article I, Sec. 8, of the Federal Constitution. (See Argument, *infra*, pp. 47-78.)

ARGUMENT

I

The Thing Taxed Is the Privilege of Receiving Gross Income

Disctussing the 1st Question Presented, and Covering Petitioners' Reasons 1, 2 and 3 for the Writ.

First. It is of highest importance in a tax case to determine the precise thing on which the tax is laid. This is the vital point on which the decisions turn; as, for example, in:

American Mfg. Co. v. St. Louis (1919), 250 U. S. 459, where a tax on the privilege of manufacturing, measured by gross receipts, was *upheld*, though the goods were sold in interstate commerce.

Utah Power & Light Co. v. Pfost (1932), 286 U. S. 165, where a tax on the privilege of generating electric current, measured by kilowatt hours, was *upheld*, though the current was moving in interstate commerce at the instant of generation.

Leach v. Nichols (1932), 285 U. S. 165, where in arriving at value of a net estate on which to reckon Federal estate tax, no deduction was allowed for state inheritance tax, because the state tax was con-

strued to be laid on the right *to receive* instead of on the right *to transfer*, though, of course, the amount of estate to be taxed and the circumstances on which the tax arose were identical.

Chassanoil v. Greenwood (1934), 291 U. S. 584, where a license tax on the privilege of engaging in business of buying and selling cotton was *upheld*, though the cotton was purchased for the purpose of shipment to out-of-state customers, because the tax was laid on a step that *preceded* the beginning of *interstate commerce.*

Fisher's Blend Station, Inc., v. Tax Commission (1936), 297 U. S. 650, where a tax on the privilege of broadcasting, measured by gross receipts, was held *invalid*, because the tax was levied *on gross receipts* from *the entire operations* which included both interstate and intrastate commerce, without allocation.

Puget Sound Stevedoring Co. v. Tax Commission (1937), 302 U. S. 90, where a tax on the privilege of engaging in business activities was held *invalid* as to receipts from the *work of loading goods on ships*, because the goods were bound for out-state or out-country destinations.

J. D. Adams Mfg. Co. v. Storen (1938), 304 U. S. 307, 314, where a tax on the privilege of receiving gross income was held *invalid*, because the receipts were derived from activities interstate as well as in-

trastate, and there was and could be no apportionment as to activities within the state. See comments on *Adams* case in *McGoldrick v. Berwind-White Coal Co.* (1940), 309 U. S. 33 at 57-58.

Felt & Tarrant Co. v. Gallagher (1939), 306 U. S. 62, where a tax on the privilege of use was *upheld*, though the tax attached immediately upon arrival of the property in interstate commerce.

Graybar Electric Co., Inc., v. Curry (1939), 189 So. 186, affirmed 308 U. S. 513, where a tax on the privilege of engaging in the business of selling at retail was *upheld*, as the sales *activities were all within the state*, though the goods were moved in interstate commerce.

McGoldrick v. Berwind-White Coal Co. (1940), 309 U. S. 33, where a tax on sales ("sale" being defined as "any transfer of title or possession, or both") was *upheld*, though there was interstate commerce, because delivery—mere physical "transfer of possession"—*was alone the taxable event*, and *this occurred within the state.*

Second. The decision of the court below is not in conflict with local decisions on a question of state law. On the contrary, it was required, and is supported, by the state court decisions.

(a) The title of the Act is specific as to what the tax shall be laid on. It reads:

"An Act to provide for the raising of public revenue by imposing a tax upon the receipt of gross income . . ." (Appendix, *infra*, p. 80.)

There is no ambiguity about this. It plainly defines the particular kind of tax that the revenue is to be raised from. It directly points to a tax on the privilege of receiving gross income, and *on no other kind* of privilege. There is nothing that remotely suggests a tax on the privilege of engaging in the business that may be the source of the income. It gives the administrative officers no leeway of discretion in construing the provisions which follow.

It is not the the type of title that has been held to authorize in the statute any sort of provisions that may relate to the subject. Under the Indiana Constitution only a title in broad and general terms may do that. Examples of such titles are:

"An Act concerning town officers," *Baltimore & Ohio R. R. Co. v. Town of Whiting* (1903), 161 Ind. 228, 230; "An Act concerning highways," *Smith v. Board* (1910), 173 Ind. 364; "An Act concerning drainage," *Thorn v. Silver* (1910), 174 Ind. 504; "An Act regulating descents and the apportionment of estates," *Stiers v. Mundy* (1910), 174 Ind. 651; "An Act concerning intoxicating liquors," *Board v. Scanlon* (1912), 178 Ind. 142; "An Act concerning municipal corporations," *Marion, Etc. Co. v. Simmons* (1913), 180 Ind. 289, 290; "An Act concerning public offenses . . . ," *Huffman v. State* (1933), 205 Ind. 75, 85.

The title here belongs to the class that the Supreme Court of Indiana uniformly since the adoption of the Constitution of 1851 has held to limit the scope of the act strictly to the wording of the title, and that provisions outside those plainly indicated by the specification in the title are invalid. The constitutional provision reads:

"Every act shall embrace but one subject and matters properly connected therewith, which subject shall be expressed in the title. But if any subject shall be embraced in an act which shall not be expressed in the title, such act shall be void only as to so much thereof as shall not be expressed in the title."

Constitution of Indiana, Art. IV, Sec. 19.

The following decisions are directly applicable:

In *Mewherter v. Price and Another* (1858), 11 Ind. 199, 201, the Court said:

". . . We have a statute entitled 'An act concerning promissory notes and bills of exchange,' which provides—

'That all promissory notes, bills of exchange, or other instruments of writing, signed by any person who promises to pay money, or acknowledges money to be due, or for the delivery of any specific article, or to convey property, or perform any stipulation

therein mentioned, shall be negotiable by indorsement thereon, etc. . . .

'The assignee of any such instrument may, in his own name, recover against the person who made the same.'

. . . We have seen that the title to the act under consideration is limited to promissory notes and bills of exchange. Its language is very explicit, and we know of no rule of construction by which it can be so extended as to embrace instruments in writing other than those which it expressly names. Hence, the title to which we have referred, cannot, in view of the constitutional provision above quoted, be held to embrace the subject of the contracts in suit; and the act itself, so far as it may, in terms, authorize their assignment, is plainly inoperative."

In *Marion School Twp., Etc. v. Smith* (1939), 215 Ind. 586, 589-590, 592, the title of the act reads:

"AN ACT providing for the levy of a tax to support the common schools of the state, providing for the apportionment and distribution of the money so raised, repealing all laws in conflict therewith, providing a penalty, and declaring an emergency."

The Court said:

"It has many times been said that the purposes of section 19 of Article 4 of the State Constitution are to prevent 'log rolling' legislation; to prevent

surprise, or fraud, in the Legislature by means of provisions in bills of which *the titles give no intimation;* and to apprise the people of the subject of legislation under consideration. Moore-Mansfield, etc., Co. v. Indianapolis, etc., R. Co. (1913), 179 Ind. 356, Ule v. State (1935), 208 Ind. 255. The Constitution of 1816 contained no such provision and the abuses that resulted therefrom are well illustrated by the following excerpt from the Report of Debates and Proceedings of the Constitutional Convention of 1850 (p. 1086):

'MR. MAGUIRE. I have heard much complaint—and there is undoubtedly some ground for the complaint—as to the manner in which legislation has sometimes been conducted in this State. I have a distinct recollection of a case somewhat similar to that referred to by the gentleman from Posey, where a section was inserted in a bill, otherwise unobjectionable, appropriating the sum of seventy-five thousand dollars for a private and local purpose. The bill had a general title, to which was added the words, "and for other purposes." The bill passed both branches of the Legislature, most probably without having been read through in either. It was discovered by the vigilance of Governor Noble, and sent back to the House in which it originated with his veto. On the question of its passage a second time it received but the single vote of the member by whom it was introduced. This and other cases to which reference might be made, shows the necessity of some measure to prevent their recurrence.'

. . . Conceding that the General Assembly might have exacted, as the price of such aid, that the teachers and bus drivers in school corporations accepting the benefits of the fund should be selected or appointed by the state department, we can not believe that any such legislative intent is disclosed by the title of the act under consideration. Our doubt upon that subject is so strong as to lead us to the conviction that it was not so intended. Would a member of the General Assembly, about to vote on chapter 167, Acts of 1933, or, would a citizen, desiring to follow the course of proposed legislation, be advised by the title of said act that it contained provisions authorizing the Department of Education to name the school teachers and bus drivers in a considerable number of the school corporations of the state? We think not. The scope of the proviso is not indicated by the title." To the same effect are:

Moore-Mansfield Construction Co. v. Indianapolis, Etc., Ry. Co. (1913), 179 Ind. 356, 367;

Crabbs v. State (1923), 193 Ind. 248, 253-254, quoting from Sutherland Statutory Construction, Sec. 87, p. 94, and Cooley, Constitutional Limitations (6th Ed.) 178.

The Indiana decisions cited by petitioners do not aid them. There has been no case, either in the highest or a lower court of Indiana, that remotely called for any consideration of the question here involved, or where any attempt was made, by court or counsel, to give or obtain a decision on the point.

In *Miles v. Department of Treasury* (1935), 209 Ind. 172, the suit was to enjoin certain steps under the Act on the ground that it was wholly unconstitutional and void. In holding the Act valid, all the Court had to do was to determine that the tax provided for was an excise tax and *not a property tax* (209 Ind. 172, at 177-188). This was all the Court was called upon to do, or tried to do. The particular type of privilege on which the tax was laid was not involved, and the Court made no attempt at precise definition.

In *Indiana Creosoting Co. v. McNutt* (1936), 210 Ind. 656, there was no issue that called for definition of the taxable event. The taxpayer *was domiciled in Indiana* and operating a creosoting plant in Indiana, and there was no contract or other obligation requiring the ties to be shipped either from or into another state. The Court merely quoted the statement in the Miles case, relied on by petitioners here, in connection with a remark that there was no attempt to lay *a property tax* on intangibles as the tax was an excise (p. 664).

In *J. D. Adams Mfg. Co. v. Storen* (1938), 304 U. S. 307, this Court had before it all decisions of the Indiana Supreme Court referred to by petitioners; and, as shown by its opinion, the Court considered the *title of the Act and all provisions of the text* in reaching a conclusion as to the particular privilege on which the tax is laid. The Court took the Attorney General of the state at his word, and held the tax was laid on the privilege of receiving gross income (304 U. S. at 311).

This is the *only tax in the United States* that is levied on the privilege of receiving gross income, as such. There are many taxes where gross income is used as a measure in computing a tax that is laid on some other privilege or taxable event. Here the tax is directly on the privilege of receiving gross income; and the amount of gross income is also used as a measure in computing the tax. Thus, the privilege taxed, and the measure of the tax, are coincidental. And this is what has made the subject confusing to the petitioners and has led them into specious arguments.

In choosing to enact this law, the legislature must be presumed *to have weighed the advantages and disadvantages* of various types of taxes. It selected the gross income tax, realizing, of course, that no one type of tax can give the benefits of all and have the shortcomings of none. From the standpoint of revenue, the results have justified the choice.* It is simply an inherent weakness of the tax that it cannot be laid on a nonresident who, without effort to evade, normally receives his gross income in the state of his domicile, even though such income is derived from sales of goods originating and delivered in the State of Indiana.

This inherent defect the state must accept, just as it accepts the unusual benefits derived from this type of tax, and *just as it had to accept the inherent defect that the tax could not reach receipts from interstate commerce*—a much larger source of revenue than the occasional source here involved.

*See Footnote, *infra*, p. 28.

(b) *The regulations promulgated by petitioners, in force during the taxable period, totally contradict petitioners' present contention as to the taxable event.*

These regulations were printed in full in the Record (pp. 75-148) in *J. D. Adams Mfg. Co. v. Storen* (October Term, 1937, No. 641; decided May 16, 1938), 304 U. S. 307. The Court considered and expressly referred to a number of these in its opinion (304 U. S. at 311, 313). The following regulation, not referred to in the briefs or opinion in the Adams case, clearly discloses the meaning the petitioners *then* placed on Section 2 of the Act:

> "Reg. 16 (In Art. 2). Effective date of law.—Tax shall apply to and shall be levied and collected upon all gross income received on or after the first day of May, 1933, regardless of the fact that such income was earned or became due prior to that date." (Adams case Record, p. 78.)

It is clear that the tax could legally be applied to *gross income* received after the Act went in force, because the tax is laid on the privilege of *receiving* gross income; but the Regulation plainly recognizes that the tax cannot be applied to income that was only earned or became due, but not received, before the Act was in force. So, if, as to non-residents, the tax is laid on the privilege of *engaging in business that is the source* of the income, then non-residents would have been exempt as to all income earned or due before, but *paid after*, the Act went in force, because they could not be taxed on a privilege exercised before the Act was in force.

And this exemption would have applied to *all* non-residents, including those having property and operating a fully integrated business and receiving the income therefrom within the state. It is common knowledge that non-residents of this class were taxed on all income *received* after the Act was in force, even though it was earned and became due prior thereto. So the taxing officials *must* have construed the Act, as shown by Reg. 16, as taxing the privilege of receiving income and not the privilege of engaging in the business that produced the income. Otherwise the taxing of such non-residents would have been invalid because applied retroactively to a privilege exercised before the Act was passed.

This conclusion is in accord with the position of the Attorney General in the Adams case which the Court refers to in its opinion (304 U. S. at p. 311). The statement of the Attorney General there referred to was in his final memorandum brief in the Adams case entitled "Summary of Oral Argument," where he said: "It is a *privilege tax* levied *upon the receipt of gross income* in Indiana, the domiciliary state of appellant . . .," and "The receipt of income by a *resident* of the taxing sovereignty is a taxable event." The Attorney General there quoted from *New York, ex rel. Cohn v. Graves*, 300 U. S. 308, 313, as follows: "That the receipt of income by *a resident of the territory of a taxing sovereignty* is a taxable event is universally recognized. Domicile itself affords the basis for such taxation."

Thus, the Attorney General there asserted, and this Court there held, that the thing taxed is *the privilege of*

receiving gross income within the borders of the taxing sovereignty.

(c) *The Adams case supports the decision of the Circuit Court of Appeals.* In the *Adams* case, the Court dealt with the question whether the tax can be imposed on the privilege of "transacting business," as now urged. It said (304 U. S. at 310): "Nor is it for the transaction of business since in many instances it hits the receipt of income from one who conducts no business." This refers to the fact that under the Act the incidence of the tax has no relation to the sources of the gross income which is taxed. All income received *within the state* is taxed regardless of its source.

Had this Court deemed otherwise, it would have followed *American Mfg. Co. v. St. Louis*, 250 U. S. 459, where, though the goods were sold in interstate commerce, the precise thing on which the tax was laid was the privilege of manufacturing in the city of St. Louis, within the state. After considering the type of tax held valid in the *American Mfg. Co.* case, this Court said (*Adams* case, 304 U. S. at 313): "So far as the sale price of the goods sold in interstate commerce includes compensation for a purely intrastate activity . . . it may be reached for local taxation by a tax on the privilege of manufacturing . . .".

Thus, this Court expressed a clear decision that the tax is not laid on the privilege of engaging in the business which produces and is the source of the income, but is laid only on the privilege of *receiving* such income.

Petitioners seek to avoid the *Adams* case by saying the tax here is authorized by Section 2 of the Act, which reads in part:

> "... Such tax shall be levied upon the entire gross income of all *residents* of the State of Indiana, and upon the gross income derived from sources within the State of Indiana, of all persons and/or companies, including banks, who are *not residents* of the State of Indiana, but are engaged in business in this state, or who derive gross income from sources within this state ..."

This contention is based upon failure to understand the language and its purpose. The first clause in the above sentence applies the tax to *residents*—those legally domiciled in Indiana. But this alone would not reach those living or engaging in business in Indiana and receiving income there, but *who are not legal residents*. The second clause, on which petitioners rely, was to fill this gap. It says the tax shall be levied:

> "... upon the gross income ... of all persons and/or companies, including banks, who are *not* residents ... but are engaged in business in the state, or who derive income from sources within the state."

This was to make the tax reach, and it does reach, hundreds of companies and persons who, *though not legally domiciled in Indiana*, engage in business and receive the income therefrom within the state. It also reaches non-resident individuals who, though not in

business, live in the state all or part of the year and there receive income from business, rentals, trusts or other sources located in the state.

This is the function, and the only function, of the language in Section 2. So construed, it serves fully the necessary purpose it was intended to serve,* without applying the interpretation urged here. But if the law was intended, or is construed, to reach gross income

*NOTE—In the October, 1940, issue of "Tax Facts Review" prepared and distributed to the public by the Gross Income Tax Division of Indiana Department of Treasury Board, the petitioners, speaking of the efficiency of this tax, said: "The gross income tax, the fourth of the new taxes and now the third largest source of public revenue in Indiana, was enacted by the state General Assembly in 1933 . . . Property tax is the largest and gasoline tax is second largest, when both state and local revenue are considered. Considering state collections only, gasoline tax is first and gross income tax is second. (p. 8.) . . . As a source of revenue the gross income tax has proven to be entirely adequate. It should be noted that gross income tax collections, by their very nature coupled closely with the general business, industry, and income reverses or prosperity, have, with the exception of one year, risen steadily since 1933. The gross income tax during the fiscal year 1939-40 produced $23,648,497.28, an all-time high." (p. 9.)

Further, in discussing "Tax Payments by Non-Residents" (p. 28), petitioners say that non-residents in 1939 paid to the State in gross income tax the sum of $3,252,549.48, "or 14.03 per cent of the total tax for that year," and also "The table below shows that revenue from this source has increased to a remarkable extent since 1933 which would indicate that residents of other states have found that Indiana's taxing policies in combination with other favorable factors offered business and industry a remarkable combination of advantages."

which *in the normal course of business* is received by non-residents at *their domicile in another state*, then it is an invalid attempt to do something that is legally impossible because such a tax is beyond the sovereignty of the State of Indiana, and constitutes an invasion of the sovereignty of another state.

The state cannot, merely by legislative enactment, project its jurisdiction over taxable events beyond its borders.

It did not try to do so here, for the real meaning of the Act gives it full range of application to gross income received in the state by non-residents, without reaching to income which in the necessary course of business is received in other states.

Third. The decision of the Circuit Court of Appeals is not in conflict with decisions of this Court.

In *Lawrence v. State Commission* (1932), 286 U. S. 276, the Court considered the question whether a state income tax could be applied to income earned outside the state. In holding such income was not exempt from the state tax, the Court said (p. 281):

> "The tax, . . . is founded upon the protection afforded to the recipient of the income by the state, in his person, *in his right to receive the income*, and in his enjoyment of it when received."

And in *Graves v. New York* (1939), 306 U. S. 466, where it was held that the salary of an employee of

the Home Owners' Loan Corporation was not exempt from the state income tax, the Court in discussing the character of the tax, said (p. 480):

> "It is measured by income which becomes the property of the taxpayer when received as compensation for his services; and the tax laid *upon the privilege of receiving it* is paid from his private funds and not from the funds of the Government, either directly or indirectly. The theory, which once won a qualified approval, that a tax on income is legally or economically a *tax on its source*, is *no longer tenable*. . . ."

So the taxable event did not occur in the State of Indiana, but occurred in the State of Pennsylvania, as all proceeds from plaintiff's tie business were received in Pittsburgh. It is beyond the jurisdiction of the taxing officers of Indiana, and the collection of such a tax violates the due process clause of the 14th Amendment.

> "A statute of a state which undertakes to tax things wholly beyond her jurisdiction or control conflicts with the 14th Amendment." *Safe Deposit and T. Co. v. Virginia* (1929), 280 U. S. 83, 92.

> "A tax on property and *rights* wholly beyond the confines of the state constitutes a taking thereof without due process of law." 1 *Cooley on Taxation* (4th Ed.), Sec. 94, p. 222.

In *Guaranty Trust Co. v. Virginia* (1938), 305 U. S.

19, after referring to other due process cases, the Court said (p. 23):

> "Those cases go upon the theory that the taxing power of a state *is restricted to her confines* and may not be exercised in respect of subjects beyond them. Here, the thing taxed was *receipt of income within Virginia* by a citizen residing there."

And in *Curry v. McCanless* (1939), 307 U. S. 357, the Court said (p. 366):

> "The power to tax 'is an incident of sovereignty, and is co-extensive with that to which it is an incident. All subjects over which the sovereign power of a state extends, are objects of taxation; but those *over which it does not extend, are*, upon the soundest principles, *exempt from taxation.*' *McCulloch v. Maryland*, 4 Wheat. 316, 429, 4 L. ed. 579, 607."

The state clearly had no jurisdiction to lay a tax on gross income received in Pennsylvania in the regular course of business, and the tax must fall.

On the question now being considered, petitioners also cite two decisions of this Court. Both of these further illustrate the importance of knowing the precise thing the tax is laid upon.

In *Equitable Life Assurance Society v. Pennsylvania* (1915), 238 U. S. 143, the tax related to premiums received by insurance companies. The company contended it was a tax on property, but the Act was con-

strued both by the state court and this Court as levying "a tax for the privilege of doing business within the Commonwealth."

The Indiana Gross Income Tax Act is not, and does not purport to be, a law fixing conditions for a foreign corporation to do business. That function is performed by the Indiana General Corporations Act of 1929.

In *Wisconsin v. J. C. Penney Co.* (Dec. 16, 1940), 85 L. Ed. advance paging 222), the taxpayer was a large concern owning property in Wisconsin and engaged there in the business of operating chain stores. Its business activities were as fully integrated within the state as other store companies having their legal domicile there. The entire business activities out of which arose the dividends on which the tax was imposed were carried on in Wisconsin. The taxpayer was doing business in Wisconsin as completely as if it had been domiciled and was operating in that state alone. The tax was apportioned entirely to activities carried on within the state, and was considered by this Court as bearing a just fiscal relation to the protection, opportunities and benefits given by the state.

In the instant case, the taxpayer has no property in the State of Indiana. It has no office, warehouse or agency, and operates no business, in Indiana. The tie transactions between respondent and the B. & O. Railroad consist of activities almost entirely outside the state. Both parties to the transactions are domiciled in other states, and the contracts under which the ties

were purchased and sold were entered into outside the state. The only activity of respondent to which the tax could have any possible relation was the service of its agent in making physical delivery of the ties by loading them on cars for shipment to Finney, Ohio, and reporting the same.

This activity was not of such character as even to have required respondent to qualify in the state as a foreign corporation because it was interstate commerce. *Dahnke-Walker Milling Co. v. Bondurant*, 257 U. S. 282, 291, 292-293.

Thus, the only activity here for which the state gave respondent an opportunity was not the "substantial privilege of carrying on business," as in the Wisconsin case, but only the placing of ties on cars. The amount of the tax, one per cent on the entire gross proceeds from the transactions, is an excessive exaction for the privilege of loading ties on a car in Indiana and reporting thereon. The tax bears no just "fiscal relation to the protection, opportunities and benefits given by the state."

The tax here is immeasurably greater than the Wisconsin tax for the benefits given by the state. Neither the incidence of the tax nor its measure is tied to that proportion of the earnings which the State of Indiana made possible, because the gross income is the result of all the activities and transactions outside of Indiana which led to the delivery.

II

The Activities Were Chiefly in Other States, and There Was No Apportionment of the Tax.

Discussing the 2nd Question Presented, and Covering Petitioners' Reasons 4, 5, 6, 7, 8 and 9 for the Writ.

First (a) *The tax is invalid because without apportionment it was imposed on gross receipts arising from activities without as well as within the state.* Petitioners say that the thing here taxed is not the privilege of receiving gross income, but the privilege of engaging, within the state, in a business which is the source of that income. If this be so, then, unless all essential activities from which the taxed receipts arise occur within the state, there must be an apportionment. No tax can legally be imposed by a state except on such portion of gross receipts as represents the business activities occurring within its borders. *Gwin, White & Prince, Inc. v. Henneford* (1939), 305 U. S. 434 at 438-439; *Adams Mfg. Co. v. Storen* (1938), 304 U. S. 307 at 313-314; *McGoldrick v. Berwind-White Coal. Co.* (1940), 309 U. S. 33 at 57-58; *Ford Motor Co. v. Beauchamp* (1940), 308 U. S. 331 at 337; *James v. Dravo Contracting Co.* (1937), 302 U. S. 134 at 138-139; *Dravo Contracting Co. v. James* (C. C. A. 4, Sept. 6, 1940), 114 F. (2d) 242 at 245.

Section 2 of the Act imposes the tax. Section 3 directs the manner of levy and the rate of the tax. Section 3(c), under which the tax here was levied, reads:

"Sec. 3. The tax hereby provided for shall be imposed at the following rates: . . .

(c) Upon the *entire* gross income of every person engaged in the business of retailing of any tangible commodity or commodities not specifically mentioned in subsection (d) of this section, one per cent."

(Appendix, p. 81; Ch. 50, Indiana Acts 1933, pp. 388, 391; Burns' Ind. Stat. 1933, Secs. 64-2601, 64-2603.)

Under this "statutory command," (see petitioners' brief, p. 24) the taxing officials are entirely without power, under any circumstances, or at any stage, to make an assessment on anything less than the "*entire* gross income" received by the taxpayer.

It follows that if essential activities leading to the delivery and sale of ties—and the receipts therefrom—occur outside the state, there is no jurisdiction to levy a tax on such portion of the receipts as flow from such activities, and the entire tax must fall.

Petitioners recognize this, so they offer the unique idea that only the *physical work* of delivering ties contributed to the proceeds. In their view all prior steps and transactions—negotiation of contracts, requisition orders, arranging with producers for ties, management, office functions and other overhead, all of which occurred outside of Indiana—are merely expense items and lead to no revenues. They ignore the fact that all

activities that were necessary to bring about the sales, or that incurred any expense reflected in the price of ties, are responsible for a portion of the proceeds.

As said by the Circuit Court of Appeals (R. 76-77, 114 F. (2d) at 926-927), had it not been for outside activities "there would have been no source of income in Indiana or elsewhere." The activities outside of Indiana which led to the gross receipts from ties are not limited, as stated by the petitioners, to "bookkeeping, invoicing and matters of similar character" (petitioners' brief, p. 31). For convenience, we summarize again the activities which constitute the tie transactions between respondent and the railroad:

Negotiation of contract between the railroad and Joyce-Watkins Co. and *assignment* to the respondent. This contract gave the railroad exclusive right on all ties respondent produced or purchased in areas near the railroad; required respondent on demand to produce or purchase for sale to the railroad all ties available in such territory; limited respondent's margin of profit on ties; authorized requisition orders; fixed methods of inspection and loading; and otherwise controlled the tie transactions.

Negotiation of contract between railroad and Central Creosoting Co., and *acquisition of control* by respondent of the latter's interest in treatment plant at Finney, Ohio. This contract required railroad to deliver 600,000 ties annually to the Finney plant for treatment. *Supplemental instructions*

from railroad, agreed to and followed by respondent, that all ties originating west of the Ohio River should be shipped to the Finney plant.

These contracts together *bound* respondent to furnish ties on requistion orders, and *bound* the railroad to have them shipped to Finney for treatment.

Activities pursuant to these contracts, include the receiving of requistion orders at Marietta, and acknowledgment of same which closed the deal as to each batch of ties; making purchase of ties out of Marietta, Ohio, office by exchange of mail, phone or telegraph communications with producers in Indiana; arranging out of Marietta office to send agent of respondent to attend loading of ties in Indiana and make reports; loading of ties on cars *in transit* to Finney, Ohio; receiving of all reports at the Marietta and Pittsburgh offices from respondent's loading agent; performing of all office and administrative functions connected with the transactions.

That the activities incidental to obtaining these contracts and the operations under them, *outside the state*, contributed to and were reflected in the gross receipts which were taxed, can not be doubted. The view of the Circuit Court of Appeals on this question is indubitably sound.

The above summary of activities in sales of ties to the railroad makes clear that it is impossible for

anyone, either tax collector or taxpayer, without legislative assistance, to allocate the portion, in dollars, of gross receipts that represents activities occurring in Indiana alone.

In such cases, where no rational apportionment is possible, and where the tax statute does not itself fix a formula for making such apportionment, *no tax at all can be levied. Dravo Contracting Co. v. James*, 114 F. (2d) 242, at 244, points 1-3. This is because it can not be levied on the basis of state activities alone, and the state has no jurisdiction to levy a tax upon activities, or the proceeds from activities, that occur in another state.

This certainly is what the Court meant in the *Adams* case (304 U. S. 307), where, construing this Act, it said (p. 314):

> "It is because the tax, forbidden as to interstate commerce, reaches indiscriminately and *without apportionment*, the gross compensation for both interstate commerce and intrastate activities that *it must fail in its entirety* so far as applied to receipts from sales interstate."

And it must be what the Court meant in *Gwin, White & Prince, Inc. v. Henneford* (1939), 305 U. S. 434, at pp. 438-439; and in *McGoldrick v. Berwind-White Coal Co.* (1940), 309 U. S. 33, at pp. 57-58; and in *James v. Dravo Contracting Co.*, 302 U. S. 134.

In the *Dravo* case, there was in question a West Virginia statute providing for "annual privilege taxes" on "business and other activities," including the business of contracting. The tax was measured by gross receipts. Dravo had a Government contract for constructing certain dams within the state. The case was briefed and argued on whether the contractor was exempt from the tax as an instrumentality of Government.

The Court, on its own initiative, pointed out that in any event the Dravo Company could not be taxed on its gross receipts derived from activities outside the state. The Court said (pp. 138, 139):

> "*First.*—As to territorial jurisdiction.—Unless the activities which are the subject of the tax were carried on within the territorial limits of West Virginia, the State had no jurisdiction to impose the tax. Hans Rees' Sons v. North Carolina, 283 U. S. 123, 133, 134; Shaffer v. Carter, 252 U. S. 37, 57; Surplus Trading Co. v. Cook, 281 U. S. 647. The question has two aspects (1) as to work alleged to have been done outside the exterior limits of West Virginia and (2) as to work done within those limits but (a) in the bed of the rivers, . . .

It is clear that West Virginia had *no jurisdiction* to lay a tax upon respondent with *respect to this work done in Pennsylvania.* As to the material and equipment there fabricated, the business and activities of respondent in West Virginia consisted of the

installation at the respective sites within that State and *an apportionment would in any event be necessary to limit the tax accordingly.* Hans Rees' Sons v. North Carolina, 283 U. S. 123, 131-132."

In *Ford Motor Co. v. Beauchamp*, 308 U. S. 331, where a corporate franchise tax was upheld, this Court re-affirmed its position in the Dravo case, saying:

"James v. Dravo Contracting Co. contains nothing contrary to this view. The statute under consideration there levied a privilege tax 'equal to two per cent of the gross income of the business.' In so far as it was *upon receipts in other states*, it was conceded to be outside of the taxing powers of the statute" (p. 337).

The scope of a state's power to tax is succinctly stated by this Court in *Lawrence v. State Tax Commission* (1932), 286 U. S. 276, at 279-280, as follows:

"The Federal Constitution . . . leaves the states unrestricted in their power to tax those *domiciled* within them, so long as the tax imposed is *upon property within the state* or *on privileges enjoyed there*, and is not so palpably arbitrary or unreasonable as to infringe the 14th Amendment. Kirtland v. Hotchkiss, 100 U. S. 491, supra."

The Court re-affirmed the same principle in *Connecticut General Life Insurance Co. v. Johnson, State Treas.* (1938), 303 U. S. 77. There, the California

Supreme Court construed the law imposing a tax on "gross premiums received upon . . . business done in this state" as applying to gross premiums *received in Connecticut* upon reinsurance of policies taken by other companies in California. Appellant was qualified to do business in California, and actually carried on business there. In reversing the state court, this Court said (p. 80):

> "But the limits of the state's legislative jurisdiction to tax, prescribed by the Fourteenth Amendment, are to be ascertained *by reference to the incidence of the tax upon its objects* rather than the ultimate thrust of the economic benefits and burdens of transactions within the state . . . Hence it is that a state *which controls the property and activities* within its boundaries of a foreign corporation admitted to do business there may tax them. But the due process clause *denies* to the state *power to tax or regulate* the corporation's property and activities elsewhere."

(b) *The burden of making an apportionment is not upon the taxpayer but upon the state.* The true rule may be stated thus: If the state seeks to impose a tax on receipts from activities that are partly without and partly within the state, the burden is upon the state itself to make the apportionment, and to segregate and tax only receipts from such activities as are wholly within the state. If the state itself has made a good-faith effort to make such allocation, *then and only then* is there a burden upon the taxpayer; and that is, to

show that the apportionment made by the state is unreasonable or arbitrary.

This is clearly settled in *Hans Rees' Sons v. North Carolina* (1931), 283 U. S. 123, 133, where the Court said:

> "The difficulty of making an exact apportionment is apparent and hence, *when the state has adopted* a method not intrinsically arbitrary, it will be sustained until proof is offered of an unreasonable and arbitrary application in particular cases. But the fact that the corporate enterprise is a unitary one, in the sense that the ultimate gain is derived from the entire business, does not mean that for the purpose of taxation the activities which are conducted in different jurisdictions are to be regarded as 'component parts of a single unit' so that the entire net income may be taxed in one state *regardless of the extent to which it may be derived from the conduct of the enterprise in another state.*"

The state has made no apportionment here and the statute provides for none. This relieves respondent from any burden of making an apportionment and likewise relieves it from any tax levied upon the entire receipts.

Petitioners urge as a major part of their argument on this point (petitioners' brief, pp. 35-36) that the burden of making an apportionment falls upon the respondent merely because *respondent is plaintiff in the action.*

This is both unsound and unfair. Respondent had no alternative but to pay the tax and then sue for a refund. The statute provides this procedure as the taxpayer's remedy (see 12 (a), Appendix, p. 82). It is a complete and adequate remedy.

Respondent could not sue to restrain petitioners from collecting the tax as a Federal Court has no jurisdiction in equity to enjoin state officials from collecting a state tax when the statute provides an adequate remedy at law. This is settled by the Judicial Code and by decisions of this Court.

Section 267 of the Judicial Code provides:

> "Suits in equity shall not be sustained in any Court of the United States in any case where a plain, adequate and complete remedy may be had at law," 28 U. S. C. A., Section 384.

In *Matthews v. Rodgers*, 284 U. S. 521, 525-526, this Court said:

> "Whenever the question has been presented, this Court has uniformly held that the mere illegality or unconstitutionality of a state or municipal tax is not in itself a ground for equitable relief in the courts of the United States. *If the remedy at law is plain, adequate, and complete, the aggrieved party is left to that remedy in the state courts*, from which the cause may be brought to this Court for review if any federal question be involved, Judicial Code,

Sec. 237, U. S. C. title 28, Sec. 344, *or to his suit at law in the federal courts if the essential elements of federal jurisdiction are present.*"

It ill becomes petitioners to seek to penalize respondent for pursuing the only course that was open to protect itself from what it deemed to be an unjust and invalid tax.

Second. The Circuit Court of Appeals did not in this case render a decision in conflict with the decision of another Circuit Court of Appeals.

The case of *Dravo Contracting Co. v. James*, 114 F. (2d) 242, is not in conflict with the decision here, but is in harmony with it.

The activities outside of West Virginia (the taxing state) had been segregated in the District Court, and the tax on the receipts therefrom was eliminated. There was no dispute on this, as it was required by order of this Court in 302 U. S. 134. The one question before the District Court, and appealed to the Circuit Court of Appeals for the Fourth Circuit, was whether *any tax at all* could be levied against Dravo Contracting Co., which contended the entire tax was void because no method of apportionment had been provided by statute. The Circuit Court of Appeals upheld the tax against receipts from activities occurring in West Virginia. Whatever was said in the opinion was relevant only in support of this holding, which was clearly sound.

There was a natural basis for apportionment of the tax in the Dravo case. The activities were such as to lend themselves readily to separation for the purpose of computing the tax on the receipts therefrom. The District Court did not create a formula for the apportionment—that was beyond its jurisdiction. The formula created itself, for the transactions under the contract that occurred in Pennsylvania were separately paid for in that state.

The contractor was domiciled in Pennsylvania, certain of the activities essential to the construction work in West Virginia were in the regular course of business performed in Pennsylvania, and the contractor received his payment there.

Here, substantially all of the activities leading to ultimate delivery of ties to the railroad occurred in Pennsylvania, Maryland and Ohio, and payment for *all* the activities under the contracts was made in Pennsylvania. Only a minor fraction of the time, effort and cost leading to delivery of ties occurred in Indiana. The Fourth Circuit in its opinion in the Dravo case completely supports the decision of the Seventh Circuit in this case when the former said (114 F. (2d) at p. 245):

"We agree with taxpayer that the court was without power to apportion its income on the basis of the cost of the activities involved in earning the income within and without the state. No such basis of apportionment is prescribed by statute; and, in the ab-

sence of statute, the court is without power to adopt it, as this is a legislative function involved in the imposition of the tax, and, therefore, not one which courts may exercise. (Citing Cases.) In cases where the tax imposed is not in its nature divisible and some part thereof is beyond the taxing power of the state and no provision is made for apportionment, the whole tax is void. Gwin, White & Prince, Inc. v. Henneford, 305 U. S. 434. Adams Mfg. Co. v. Storen, 304 U. S. 307. Bowman v. Continental Oil Co., 256 U. S. 642. As said by Mr. Justice Holmes in Meyer, Auditor of the State of Oklahoma v. Wells, Fargo & Co., 223 U. S. 298, 302, 'Neither the court below nor this court can reshape the statute simply because it embraces elements that it might have reached if it had been drawn with a different measure and intent.' If, therefore, any such apportionment as was made by the court below were necessary *to separate the portion of the income which the state has jurisdiction to tax from the remainder*, the tax would unquestionably be void in its entirety."

Third. The decision of the Circuit Court of Appeals is not in conflict with applicable decisions of this Court.

The decisions cited by petitioners support our theme instead of theirs. In *Pittsburgh Life & Trust Co. v. Young* (1916), 172 N. C. 470, 90 S. E. 568, there was no occasion for apportionment of the tax, because the entire activities from which the receipts were derived occurred in the taxing state. In *Underwood Type-*

writer Co. v. Chamberlain (1920), 254 U. S. 113, and in *Bass, Ratcliff & Gretton, Ltd., v. State Tax Commission* (1924), 226 U. S. 271, the tax was not imposed on the entire activities from which the taxed receipts were derived. Instead, on a basis provided in the taxing acts, the tax was laid only on such portion of gross receipts as fairly represented activities occurring in the taxing state.

III

The Commerce Was Interstate, and the Tax Invalid.

Discussing the 3rd Question Presented, and Covering Petitioners' 10th and 11th Reasons for the Writ.

First. (1) *The activities here were in interstate commerce.*

The contracts on which the business was based were between parties with domiciles and branch offices in different states, neither in Indiana. Both contracts contemplate interstate transactions. One, between the B. & O. Railroad and respondent as assignee (called the Joyce-Watkins contract), requires respondent to furnish ties from territory near the railroad and within economical distance from the treatment plants. Another, between the railroad and respondent's subsidiary, National Lumber & Creosoting Company, requires the railroad to send 600,000 ties each year to respondent's plant at Finney, Ohio, for treatment. And a third agreement, supplemental to the above, requires respondent to " . . . ship all ties originating at points

on the B. & O. Railroad west of the Ohio River to Finney, Ohio . . . "

Pursuant to these contracts, a course of business in furnishing ties to the railroad was established before the tax act was in existence. The Circuit Court of Appeals correctly held that the transactions under this course of business were interstate commerce.

Petitioners merely repeat here their arguments below. They say there was nothing in the contracts which required the railroad to buy any cross-ties from respondent; that there was only an option for ties; that no sale took place until the individual ties were ascertained by inspection at the instant of delivery; that nothing required any shipment of ties interstate or otherwise; that the place where title passed is important; that the commerce was not interstate because the purchaser was a common carrier transporting its own property; etc.

This argument is interesting as theory, but it ignores all the realties of business operations. It also ignores facts found by the District Court. Before going into the specific facts, we offer a short resumé of the realities of the situation.

The Joyce-Watkins contract, during the taxable period, was between two business concerns desiring to co-operate for the advantage of both. The railroad owned a treatment plant in Green Springs, W. Va., of which respondent was lessee and was operating. The

railroad also had a contract with respondent (as successor owner through a subsidiary) which required the railroad annually to send 600,000 ties to respondent's Finney, Ohio, plant for treatment. Both parties knew each other's business needs. Nothing was more natural or essential than that the railroad should buy ties of respondent. It would not have been normal, nor conducive to each other's interests, for the railroad to have bought its ties from outsiders. Thus, the business relationship between the parties, as well as their contracts, *compelled* the railroad to buy its ties from respondent.

The railroad was operating lines of great mileage. It *had* to have new ties. It *had* to have them treated for preservation. Both parties knew this when respondent became lessee of the Green Springs, W. Va., plant. In the lease contract with respondent, the railroad had agreed to deliver to the Green Springs plant "the ties and other forest products which it desires to have treated." The maintenance of its lines *compelled* it to "desire" to have the ties treated (R. 23, 11. 1-7). So the actual requirements of the contract made the railroad send the raw ties to one or the other of respondent's treatment plants. The same contract compelled respondent to acquire, and sell and deliver to the railroad, all ties ordered by it in territory convenient to the railroad (R. 25, 11. 40-45; R. 26, 11. 10-15).

There can be no doubt as to what these provisions of the contracts implied under existing circumstances.

They implied *a course of business exactly such as the parties* actually followed. And this course of business began *prior to the tax Act.* The contract of the railroad for treatment of ties at the Finney, Ohio, plant was in force since December 21, 1922, and respondent's ownership (through its subsidiary) began prior to 1933. So the railroad must have been sending ties out of Indiana to the Finney plant both before and after respondent's ownership thereof and prior to 1933. (R. 29; R. 38, 11. 10-25.) This is confirmed by the natural implication of the words "of course" in the shipping directions of the railroad before operations began by respondent under the Joyce-Watkins Green Springs contract. (R. 49, 11. 21-24.)

So, the railroad from Baltimore gave orders for ties to respondent which were acknowledged from Marietta, and thus *became definite obligations.* They were obligations which, under the contracts, required respondent to furnish and deliver, and the railroad to accept, the full number of ties ordered to the extent they complied with the railroad specifications. The "ascertainment" at the railroad siding was nothing but *a checking against specifications*—a thing entirely customary in all lines of business before a purchase is finally accepted, however absolute may be the contract.

As to the interstate destination of the ties, the railroad had contracted, as before shown, to send all ties it desired treated under the Joyce-Watkins contract to the Green Springs plant. For convenience and econ-

omy, it modified this contract, with respondent's consent, so that respondent should ship all ties originating west of the Ohio River to the Finney, Ohio, plant, where the railroad was required to have 600,000 ties per year treated. (R. 49, ll. 9-26.) So, beyond all caviling, the contracts *did* require the Indiana ties to be shipped to Ohio, and neither the railroad nor respondent could have done anything else *without violating contract obligations.*

The findings by the District Court that support the above resume are referred to in the condensed statement at the opening of this brief (*supra*, pp. 4-9), and are found chiefly in paragraphs: *b* (1), (2) and (3); *c; e; g; h; j; k.* The facts will be specifically stated under the respective points discussed below.

a. The sales took place outside of Indiana. Petitioners urge that the sale of ties to the railroad, as well as delivery of the ties, occurred within the state. The facts contradict this view.

Under the decisions, it is wholly unimportant as to existence of interstate commerce, whether the bargain touching the sale was concluded within or without the state. However, to settle the question, the court's findings, including provisions of the contracts touching this point, will be assembled and analyzed.

The Joyce-Watkins contract was assigned to respondent May 3, 1933, "and all ties supplied to the

Railroad Company have been supplied under that contract." (R. 29, 11. 14-22.)

"The Contractor agrees to sell to the Railroad all ties produced or purchased by it originating in territory from which ties in the usual course of business would be brought to the lines of the Railroad to the extent that the Railroad may give orders to the Contractor for the purchase of such ties." (Joyce-Watkins contract, R. 25, 11, 40-46.)

"The Contractor will produce or purchase from other producers the ties so ordered, and sell and deliver the same to the Railroad as ordered . . ." (Same contract, R. 26, 11. 10-15.)

Under the above clauses, the railroad could, and did, *demand* that respondent supply it with ties out of Indiana territory convenient to the railroad.

"The Purchasing Agent of the Railroad shall advise the Contractor from time to time in writing of the quantities and kinds of ties which the Railroad will need and the time within which it desires the ties to be delivered, and the price which the Railroad is willing to pay the Contractor f.o.b. cars on the railroad's tracks." (Same contract, R. 26, 11. 5-10.)

This clause provided for *requisition orders* from time to time. As the contract covered a period of five years from March 1, 1933, naturally it authorized purchase of the ties as needed and provided for price fluctuations.

Details of performance of the Joyce-Watkins contract, and the construction placed thereon by the parties when operating thereunder, indicate the sales did not take place in Indiana:

> "During the years in question, the following was the regular course of business: The *Railroad Company*, by telephone calls from its purchasing agent at Baltimore, Md., *advised* a representative of *the plaintiff* at its office *at Marietta, Ohio*, of the ties to be required by it for a certain period in advance, and the price which it would be willing to pay. The *oral communication of the order* of the Railroad Company for ties under the Joyce-Watkins contract *was acknowelged by agents of the plaintiff at Marietta, Ohio . . .*" (R. 38, 11. 26-35.)

It is plain that under the contract the requisition orders by railroad and acknowledgment thereof by respondent were intended to create, and did create, *a fixed obligation on respondent* to furnish the ties as ordered. The deal as to each batch was closed. Nothing remained to be done between respondent and the railroad, except inspection of the ties by the railroad as they were loaded by respondent. This is recognized in the ending of the above-quoted sentence, which continues: "and *thereupon* the plaintiff prepared and mailed to known producers" circulars stating specifications and prices for ties respondent was inviting them to furnish. (R. 38, 1. 35, to R. 44, 1. 16.)

The inspection of ties by the railroad was *not* for the purpose of completing the transaction of purchase and

sale, but for checking the ties *to see that they came up to specifications.*

The foregoing extracts from the findings show conclusively that all *sales* of ties *were concluded* entirely outside of Indiana. Consummation *by delivery* of the ties on board cars was a subsequent step, and took place in Indiana.

b. The contracts required interstate shipment of the ties. The findings plainly show that from the time operations under the contracts began, all ties originating west of the Ohio River were, at the instant requisition for them was made, definitely destined for shipment to Finney. Failure to ship them there would have been *violation of its contract* by respondent. Failure to transport them there would have been *violation of its contract* by the railroad.

There can be no mistaking the significance of the following findings and contract provisions:

"All of the ties furnished by plaintiff to the Baltimore & Ohio Railroad Company under the Joyce-Watkins contract during the years 1934, 1935 and 1936 were treated before use by the Railroad Company." (R. 49, 11. 28-31.)

"The Railroad agrees to deliver to the Contractor on cars at the treating plant the ties and other forest products which it desires to have treated." (Joyce-Watkins contract, R. 23, 11. 1-3.)

As all ties required preservative treatment before use, the above clause is a *definite agreement* by the railroad to send *all* ties to respondent's treatment plant at Green Springs, W. Va. To save distance in shipping, this was later modified to send ties originating west of the Ohio River *to Finney, Ohio.*

The shipping instructions, which constitute the supplemental agreement modifying the destination of ties originating west of the Ohio River (condensed statement, *supra*, par. *b* (3), p. 6), are:

> "You will, of course, ship all ties originating at points on the B. & O. Railroad west of the Ohio River to Finney, Ohio; and ties originating east of the Ohio River to Green Springs, W. Va." (R. 49, 11. 21-24.)

The Joyce-Watkins contract originally required the railroad to send all ties it wanted treated to the Green Springs, W. Va., plant; and except for the supplemental shipping instructions, accepted by respondent, the railroad would have had to send these specific ties to Green Springs, W. Va. But, as respondent operated the Finney plant, through its subsidiary, transfer of the ties to Finney for treatment was satisfactory to it. This was also in accord with the contract requiring the railroad to deliver 600,000 ties per year to that plant for treatment.

Except for these facts, which made respondent willing for the ties to go to Finney, it could, under the

Joyce-Watkins contract, *have compelled* the railroad to send the ties originating in Indiana *to Green Spring, W. Va.*, for treatment. And this also would have been a transaction in interstate commerce.

This is confirmed by the following finding:

> "It (the respondent) does not, however, sell ties or timbers to any one other than to those with whom it has a contract to treat such ties or timbers, nor does it produce or purchase ties or timbers for sale to any one other than to persons or corporations with whom it has a contract to treat the ties or timbers, and does treat the ties and timbers so produced and purchased." (R. 20, l. 35, to R. 21. l. 5.)

c. The course of business, pursuant to the contracts, was interstate commerce. The following findings show that by uniform practice both seller and buyer of the ties followed the mandate of the contracts to ship the ties to Finney, Ohio:

> "When the ties were ready at a loading point, an inspector of the plaintiff and of the Baltimore & Ohio Railroad Co. would go to the loading point, and all ties accepted by the Railroad Company's inspector were loaded by the producer on cars of the railroad. (R. 44, 11. 30-35.)

> "At the end of each day's loading of ties along the right of way of the Railroad in Indiana, the ties were billed by plaintiff's agent in the name of Wood

Preserving Corporation, as shipper, to the Baltimore & Ohio Railroad, in care of the person who was at the time Chief Engineer of Maintenance at Finney, Ohio." (R. 48, l. 41, to R. 49, l. 2.)

"One copy of the shipping report, together with the billing of cars, was sent forward to the Finney, Ohio, treatment plant and to the Baltimore, Md., office of the Railroad Company." (R. 45, ll. 26-30.)

"All of the ties originating in Indiana during the years of 1934, 1935 and 1936 were delivered to the Railroad Company f.o.b. cars at points of origin within Indiana, were carried by the Railroad Company from the point of origin in Indiana to the Finney, Ohio, treating plant, and there yarded, seasoned and treated pursuant to the Central Creosoting contract . . ." (R. 48, ll. 1-7.)

The above findings tell their own story without discussion, and prove conclusively that the course of business followed in shipping ties to Finney, Ohio, was *pursuant to contract agreements* and constitutes interstate commerce.

d. Loading the ties was interstate commerce. Title to the ties passed to the railroad either at the loading point in Indiana, or when they reached the Chief Engineer of Maintenance at Finney, Ohio—it is not important which. In *Dahnke-Walker Milling Co. v. Bondurant* (1921), 257 U. S. 282, 290-292 (discussed *infra*, p. 68), title to the farmer's wheat passed when

he delivered it f.o.b. cars at his home town in Kentucky, and before it started to its destination in Tennessee. There the wheat was to go to Tennessee, but the farmer did not pay the cost of transportation. Here the ties were to go to Ohio, but the seller did not pay the cost of transportation.

If title to the ties passed to the railroad at the loading point, it was held by respondent only for a moment. Ties waiting at the loading point belonged to the producer until accepted as to specifications by the railroad. Respondent paid for and acquired no ties except those accepted by the railroad inspector. When the parties were ready for a loading, they went to the pile of ties, with a car standing by, and as the railroad inspector examined the ties, each tie accepted by him was *instantly* loaded on the car. Respondent did not acquire title till then. Assuming that title passed from respondent to the railroad when the ties were laid on the cars, it was coincident with the delivery.

After the ties were acquired by plaintiff, they *did not come to rest in Indiana.* They were on their way to Finney, Ohio, and in interstate commerce, at the instant of approval by the railroad inspector and as laid upon the cars. "The very act that passed the title, and that would have incurred the tax had the transaction been domestic, committed the goods to the carrier which was to take them . . ." to their destination in another state. *A. G. Spalding & Bros. v. Edwards* (1923), 262 U. S. 66, 69.

As directly supporting our statement that the loading of ties on the cars was itself an act of interstate commerce, we cite also *Puget Sound Stevedoring Co. v. Tax Commission* (1937), 302 U. S. 90. There, a Washington statute levied a tax "for the privilege of engaging in business activities." As here, the tax was measured by gross receipts. The Stevedoring Co. was engaged in the loading and unloading of goods on ships bound to or from ports in other states and countries. The state sought to tax the receipts derived from the activity of loading freight from the dock onto the ships. The Court, by Mr. Justice Cardozo, held the tax invalid, and said:

> "No one would deny that the crew would be engaged in interstate or foreign commerce if busied in loading or unloading an interstate or foreign vessel. cf. *B. & O. S. W. R. Co. v. Burtch*, 263 U. S. 540, ... The longshoreman busied in the same task bears the same relation as the crew to the commerce that he serves. (302 U. S. at p. 92.)
>
> "The business of loading and unloading being interstate or foreign commerce, the State of Washington is not at liberty to tax the privilege of doing it by exacting in return therefor a percentage of the gross receipts. Decisions to that effect are many and controlling." (302 U. S. at p. 94.)

And in *California Rice Industry v. Federal Trade Commission* (1939, C. C. A. 9), 102 F. (2d) 706, the Court said (p. 718):

"The loading 'on board' the cars, or the car or truck movement from the rice mill to the dock, constitutes the beginning of the interstate or foreign transit."

In the instant case, if the crew of the freight train had loaded the ties on the cars, no one could deny that they were engaged in interstate commerce. Similarly, under the above decision, the loading of the ties by respondent, under contracts requiring the ties to be delivered f.o.b. cars and shipped to Finney, Ohio, is no less an act of interstate commerce than was the work of the longshoremen in the above case.

e. Not important how the ties were transported. The railroad moved these ties, along with other freight, in the ordinary way as a common carrier. It assumed no control over the ties *as owner*, nor any of the incidents of possession, until the cars reached Finney, when the Chief Engineer of Maintenance for the railroad, as consignee, took them in charge and delivered them to the treatment plant.

This was a perfectly normal method of moving the ties to Finney, regardless of when title passed to the railroad. It was more convenient and less expensive than for either respondent or the railroad to employ a truck or to ship by another railroad. The railroad had facilities for handling them, and did so. *Kelly v. Rhoads*, 188 U. S. 1, 9; *Stockard v. Morgan*, 185 U. S. 27, 32. It is common practice, irrespective of where title to the goods may pass, for the buyer to determine

the method of shipment. It is also customary where a manufacturer or jobber sells goods that are to be transported to their destination by rail, to deliver the goods f.o.b. cars, and to issue bill of lading to the buyer, as consignee, precisely as respondent did here. In such cases, the buyer pays the freight. Sometimes title passes with delivery on the cars, and sometimes not. But *in every case*, if the destination is in another state, the *transaction is interstate commerce. Santa Cruz Fruit Packing Co. v. National Labor Relations Board* (1938), 303 U. S. 453, 463.

Respondent did ship the ties by rail, and did issue bills of lading accordingly, and this was done under contract and specific directions of the purchaser. Even the absence of a contract or obligation to ship out of the state "does not affect the substance of the matter when in fact such a shipment was *contemplated* and *made*." *Federal Trade Commission v. Pacific States Paper Trade Association* (1927), 273 U. S. 52, 64. That respondent paid no freight on the ties has no more effect on character of the commerce than in the ordinary case of a manufacturer or jobber selling goods into another state and shipping in the same manner.

The use of a common carrier in moving goods across state lines is not necessary to make the commerce interstate. Logs floated across by the current of a stream are in interstate commerce. *Coe v. Errol* (1886), 116 U. S. 517, 527-528. Cattle or other stock driven across, or drifting across on the open range, are

in interstate commerce. *Thornton v. United States* (1926), 271 U. S. 414, 425.

The cases cited *supra* and herein below fully support the decision of the Circuit Court of Appeals on the commerce question. As specifically declared in these cases, it is wholly unimportant, in determining the nature of the commerce—whether interstate or intrastate:

(a) where title to the commodity passes, *Santa Cruz Fruit Packing Co. v. National Labor Relations Board* (1938), 303 U. S. 453, 463; *Pennsylvania R. Co. v. Clark Bros.* (1915), 238 U. S. 456, 465-466; or

(b) whether the purchaser can use the commodity, or ship it to another destination, in the state of origin, *Dahnke-Walker Case* (1921), 257 U. S. 282, 292; *United States v. Reading Co.* (1912), 226 U. S. 324, 367; *Eureka Pipe Line Co. v. Hallanan* (1921), 257 U. S. 265, 271; or

(c) who pays the cost of transportation, *Santa Cruz Fruit Packing Co. v. National Labor Relations Board*, 303 U. S. 453, 463; or

(d) that the carrier is itself the owner of the property being transported interstate, *The Pipe Line Cases* (1914), 234 U. S. 548, 560; *United Fuel Gas Co. v. Hallanan* (1921), 257 U. S. 277, 280-281; *Standard Oil Co. v. Johnson* (1939, Cal.), 92

Pac. (2d) 470, 472-473; *United States v. Reading Co.* (1912), 226 U. S. 324, 342, 267; or

(e) that the property is for the ultimate use of the buyer, who is also the carrier, *Valvoline Oil Co. v. United States* (1939), 308 U. S. 141, 146; *O'Brien v. United States* (1923, C. C. A. 6), 290 Fed. 185, 186-187; *Standard Oil Co. v. Johnson* (1939, Cal.) 92 Pac. (2d) 470, 473, (citing U. S. Supreme Court decisions).

(2) *The tax is of the multiple type.*

It is obvious that if a tax may be imposed upon this gross income by the State of Indiana, *where it was not received*, a like tax may be imposed upon it by the State of Pennsylvania, *where it was received.* And as the commerce touches the State of Ohio by reason of the activities at and through respondent's Marietta office, a tax in substance the same, measured by the amount of gross receipts from the transactions, may with equal right be imposed by the State of Ohio. Thus, respondent's transactions in furnishing ties to the railroad may be subjected by other states to additional taxes, in substance the same, "merely because interstate commerce is being done."

In a line of decisions of this Court unbroken to this day, it has been held that a state tax upon gross receipts from interstate transactions is a *direct burden* upon the commerce itself, and is invalid. In *Gwin, White & Prince, Inc. v. Henneford* (1939), 305 U. S. 434, the Court said (p. 441):

"For more than a century, since *Brown v. Maryland*, 12 Wheat. 419, 445, it has been recognized that under the commerce clause, Congress not acting, some protection is afforded to interstate commerce against state taxation of the privilege of engaging in it. (Citing cases.) For half a century, following the decision in *Philadelphia & S. Mail S. S. Co. v. Pennsylvania*, 122 U. S. 326, it has not been doubted that *state taxation of local participation in interstate commerce*, measured by *the entire volume* of the commerce, is likewise foreclosed."

The multiple feature, as an element of invalidity of a state tax, was not expressly discussed until the *Western Live Stock* case, *infra;* but, as shown in citations by the Court in recent cases, the risk of multiple taxation has been present in substantially all instances where a state tax has been held invalid as applying to interstate commerce. (See authorities following citation of the *Adams* case in *Gwin, White & Prince* case, 305 U. S. 434, 439.)

In *Western Live Stock v. Bureau of Revenue* (Feb. 1938), 303 U. S. 250, the Court upheld a tax on gross receipts of a magazine derived from out-of-state advertisements. Mr. Justice Stone, after reciting varieties of state taxes that have been held valid, though affecting interstate commerce, said (pp. 255-256):

"All of these taxes in one way or another add to the expense of carrying on interstate commerce, and in that sense burden it; but they are not for that

reason prohibited. On the other hand, local taxes, *measured by gross receipts from interstate commerce*, have often been pronounced unconstitutional. The vice characteristic of those which have been held invalid is that they have placed on the commerce burdens *of such a nature as to be capable*, in point of substance, *of being imposed*, (citing cases) *or added to*, (citing cases) *with equal right by every state which the commerce touches*, merely because interstate commerce is being done, so that without the protection of the commerce clause it would bear cumulative burdens not imposed on local commerce. (Citing cases.) The multiplication of state taxes measured by the gross receipts from interstate transactions would spell the destruction of interstate commerce and *renew the barriers to* interstate trade which it was the object of the commerce clause to remove."

In *J. D. Adams Manufacturing Co. v. Storen* (May, 1938), 304 U. S. 307, the Court, in holding the Indiana tax here involved could not legally be applied to gross receipts from transactions in interstate commerce, said (pp. 311-312):

"The vice of the statute as applied to receipts from interstate sales is that the tax includes in its measure, *without apportionment*, receipts derived *from activities in interstate commerce;* and that the exaction is of such a character that if lawful it may in substance be laid to the fullest extent by states in which the goods are sold as well as those in which

they are manufactured. Interstate commerce would thus be *subjected to the risk of a double tax burden to which intrastate commerce is not exposed,* and which the commerce clause forbids. We have repeatedly held that such a tax is a regulation of, and a burden upon, interstate commerce prohibited by Article 1, Sec. 8 of the Constitution. The opinion of the State Supreme Court stresses the generality and nondiscriminatory character of the exaction, but it is settled that this will not save the tax *if it directly burdens interstate commerce.*"

In the *Gwin, White & Prince* case (Jan., 1939), 305 U. S. 434, the Court had before it a Washington state tax, measured by gross receipts, on the privilege of "business activities." The factual situation was very similar to that here, the chief difference being that the taxpayer was a marketer, selling for the producer (fruit grower), instead of acquiring title to the products it sold. In denying validity of the tax, Mr. Justice Stone, after discussing the facts, said (p. 439):

"Here the tax, measured by the entire volume of the interstate commerce in which appellant participates, *is not apportioned to its activities within the state.* If Washington is free to exact such a tax, other states to which the commerce extends may, with equal right, lay a tax similarly measured for the privilege of conducting within their respective territorial limits the activities there which contribute to the service. The present tax, though nominally local, thus in its practical operation discrimi-

nates against interstate commerce, since it imposes upon it, merely because interstate commerce is being done, *the risk of a multiple burden to which local commerce is not exposed.*" (Citing the *Adams* case, and others.)

In *Dixie Ohio Express Co. v. State Revenue Commission* (1939), 306 U. S. 72, the Court said (p. 76):

"It is elementary that a State may not impose a tax on the privilege of engaging in interstate commerce." (Citing cases.)

And in *Southern Pacific Co. v. Gallagher* (Jan. 30, 1939), 306 U. S. 167, after discussing types of state taxes held valid or invalid under the commerce clause, the Court re-affirmed the multiple tax principle stated in *Western Live Stock* case and *Adams* case, as follows (pp. 174-175):

"Where a similar levy by other states may be imposed with consequent multiplicity of exaction on commerce for the same taxable event, local tax of a privilege, measured by total gross receipts from interstate transactions *is considered identical with an exaction on the commerce itself.* This rule is applicable to a tax on gross receipts from interstate transportation; an occupation tax measured by gross receipts from radio broadcasting; and a *general tax* at specified rates upon the gross income of every resident, *construed* as 'a *tax upon gross re-*

ceipts from commerce' '*without apportionment.*' . . ." (Citing cases in notes 19, 20, 21, 22, 23 and 24.)

Second. The decision of the Circuit Court of Appeals is not in conflict with decisions of this Court.

The leading decision of this Court upon this subject is *Dahnke-Walker Milling Co. v. Bondurant** (1921), 257 U. S. 282. In that case, it was the "*course of business*" in preceding years that determined the character of the commerce.

By contracts made in Kentucky, the farmer agreed to sell wheat to Dahnke-Walker and deliver it f.o.b. cars at the farmer's home town in Kentucky. The wheat was paid for there, and title passed to the buyer when it was loaded on the cars there. The seller was not authorized to ship or consign the wheat to another state or to *any* destination; the buyer itself had charge of that. There was nothing to prevent the buyer from reselling the wheat or shipping it to a destination in Kentucky. (See same case, 175 Ky. 774, 195 S. W. 139.) The making of the contract and the entire transaction of purchase and sale, including delivery, payment and transfer of title—all occurred in Kentucky; but by the course of business in prior years, the wheat was intended to go to Tennessee for treatment at the buyer's mill. It had been the practice to send it there,

*NOTE—In the *Dahnke-Walker* case, the wheat farmer, Bondurant, of Kentucky, was the seller, like respondent here. The Dahnke-Walker Milling Co., of Tennessee, was the buyer, like the railroad here.

though nothing required the buyer to do so. This was known by both parties at all times.

It was a state regulation as to suits brought by a foreign corporation, not a tax, that was involved in the *Dahnke-Walker* case, but it was necessary *first to determine the character of the commerce*—whether interstate or intrastate. This Court held it was interstate. (257 U. S. 282, at pp. 290-292.)

The case here is a stronger instance of interstate commerce than the *Dahnke-Walker* case. Here, neither party was domiciled in Indiana; the contracts and sales orders were negotiated and closed in other states; all payments were made and received outside the state; the ties were destined by contracts to Finney, Ohio; deliveries were made on board cars in Indiana, consigned by the seller to the buyer at Finney, Ohio; and the buyer could not have prevented the ties from going to Finney without violating its contract to deliver them there.

In the *Dahnke-Walker* case, the seller (the farmer) had no interest whatever in the destination of the wheat. Here, both parties had a definite contract interest in sending the ties from Indiana to Finney, Ohio, for treatment. This Court has used the *Dahnke-Walker* case unbrokenly since December 12, 1921, as stating a correct descriptive definition of interstate commerce.

In *Currin v. Wallace* (1939), 306 U. S. 1, the Court sustained validity of the Federal Tobacco Inspection

Act, although all of the tobacco inspected was sold at auction locally in North Carolina (the transaction, offering, bids, sale, delivery, passing of title, and payment—all being local), it was shown that *under the market practices involved*, the major portion of the tobacco inspected and sold was *intended* to be shipped in interstate commerce. The Court found that interstate commerce was contemplated and so upheld the Act, saying (p. 10):

> "So far as the sales are *for shipment* to other States or to foreign countries, it is idle to contend that they are not sales in interstate or foreign commerce and subject to congressional regulation. Where goods are purchased in one State *for* transportation to another, the commerce *includes the purchase* quite as much as it does the transportation. . . ." (Citing *Dahnke-Walker* case and others.)

In *Mulford v. Smith* (1939), 307 U. S. 38, the Court considered the constitutionality of applying the Agricultural Adjustment Act to the marketing of certain tobacco. The application of the act depended on whether the tobacco was marketed in interstate commerce. The Court said (pp. 47-48):

> "It (the statute) purports to be solely a regulation of interstate commerce, which it reaches and affects at the throat where tobacco enters the stream of commerce,—the marketing warehouse. . . . This Court has recently declared that sales of tobacco by growers through warehousemen to purchasers *for*

removal outside the state constitute interstate commerce." (Citing *Currin v. Wallace*, 306 U. S. 1, 10, and the *Dahnke-Walker* case, 257 U. S. 282, 290.)

In *United States v. Rock Royal Co-operative, Inc.*, (June 5, 1939), 307 U. S. 533, the interstate commerce point was involved because the price regulation in the Order was made to apply to milk produced by farmers located in states other than New York, which was sold by such farmers to "handlers" or dealers in milk located in the same state, paid for there, title passed there, and *the transaction fully completed there*, although the "*handler*" or *dealer* after paying for and *acquiring title* to the milk, shipped it into the State of New York. The Court said (pp. 568-569):

> "The challenge is to the regulation 'of the price to be paid upon the sale by a dairy farmer who delivers his milk to some country plant.' It is urged that the sale, a local transaction, is fully completed before any interstate commerce begins and that the attempt to fix the price or other elements of that incident violates the Tenth Amendment. But where commodities are bought *for use beyond state lines*, the sale is a part of interstate commerce." (Citing *Dahnke-Walker* case and others.)

And in *Valvoline Oil Co. v. United States* (1939), 308 U. S. 141, 144-145, a pipe line company again made the claim that it was not a common carrier because "it does not transport interstate other oil than that which it purchases at the well for its own use." The Court held otherwise, saying:

"Whether the oil so owned and transported was ultimately used by the carrier in its own operations or sold to others was in this connection immaterial. . . . This was covered by the pipe line decision. There it was stated that commerce is not dependent on title, 'and the fact that the oils transported belonged to the owner of the pipe line is not conclusive against the transportation being such commerce'."

During the three taxable years, respondent pursued a single and undeviating practice under the contracts and shipping instructions referred to which constituted *a course of business* whereby the ties were in fact sold *for transportation to another state*, and were so transported.

Such without question was the intent and contemplation of the parties at all times. That this constitutes interstate commerce there can be no doubt. As was said in *Foster-Fountain Pack. Co. v. Haydel* (1928), 278 U. S. 1, 10, "in determining what is interstate commerce, courts look to practical considerations and the established course of business." (Citing *Swift & Co. v. United States*, 196 U. S. 375, 398; *Shafer v. Farmers Grain Co.* (1925), 268 U. S. 189, 198-199; *Dahnke-Walker* case, 257 U. S. 282, 290, and other cases.)

In *California Rice Industry v. Federal Trade Commission* (1939, C. C. A. 9), 102 F. (2d) 716, the suit was to set aside a "cease and desist" order by the Federal Trade Commission directed against members of

the petitioner, an unincorporated association. Jurisdiction of the Commission depended on whether the marketing of the rice in question was "in" interstate commerce. The Court said (p. 718):

> "In addition to the admission of interstate shipments above italicized, the California-Japan type rice is sold by petitioners under sales contracts 'f.o.b. cars' at the mill or 'f.o.b. dock' at San Francisco, most of which is destined for points outside the state. The *loading 'on board' the cars* or the car or truck movement from the rice mill to the dock, *constitutes the beginning of the interstate or foreign transit.* Thus there are sales contracts, in which it is found to be the practice of petitioners to charge uniform, fixed prices, which, as well as the delivery to the buyers are 'in' interstate or foreign commerce." (Citing *Dahnke-Walker* case and others herein referred to.)

In *Standard Oil Co. v. Johnson, State Treas.* (1939, Cal.), 92 Pac. (2d) 470, the suit was to recover sales taxes, measured by gross receipts, paid by Oil Company to Southern Pacific Company (railroad) for fuel oil used by it in other states. The facts, in each particular, parallel the facts in the instant case. There, as here, the contracts "contemplated" movement of the oil to other states; the oil was delivered on cars of the buyer at places in California; title passed to the buyer at the loading point (as the state claims here); transportation out of the state was by the buyer, itself a common carrier, instead of by an independent common

carrier; waybills to the destination in other states were issued by the seller as the cars were loaded; and the buyer itself was the ultimate user of the oil.

The Oil Company claimed the tax was not applicable as the transactions were interstate. The state contended the sales were not in interstate commerce, because the contracts were made in California, the oil was delivered and title passed there, the buyer was the ultimate user, and the oil was transported to other states not by an independent common carrier, but by the buyer itself. The Court held the commerce was interstate, and based its decision entirely upon decisions of the United States Supreme Court, including *Dahnke-Walker* case and others cited in this brief.

Petitioners' argument on this question. Petitioners contest the value of the *Dahnke-Walker* case (257 U. S. 282, 290-292), as a precedent here, saying the thing involved in that case was not a state tax but a state regulation of foreign corporations. This is true. But in order to determine whether the state regulation was applicable to the situation, this Court had *first* to determine whether the transaction involved was intrastate commerce or interstate commerce. If the commerce was interstate, the regulation did not apply. And this Court so found.

Petitioners' contention assumes that a state tax affecting interstate commerce is not a *regulation.* Yet whenever a state tax has been held invalid under the commerce clause as a burden on interstate commerce, it was because the tax was a "regulation" under the

clause which authorizes Congress "to *regulate* commerce with foreign nations, and among the several states . . ."

Petitioners' idea is fundamentally unsound. Under the facts constituting any given activity, the transaction is either one of *interstate commerce* or it *is not*. Where the validity of a regulation is in question, the first and vital thing to determine is whether the activities affected *are* interstate or intrastate. The kind of regulation that is to be applied, or can be applied, must depend on whether there is interstate commerce or not. The *type of regulation* to be applied does not *in itself* throw any light on *whether the transaction is interstate or intrastate*. The fact that *Congress* has attempted to regulate a certain class of activities does not *per se* make them *inter*state in character; nor does the fact that a *state legislature* has undertaken to regulate the same class of activities, by tax or otherwise, *per se* make them *intra*state in character.

In every case where the Dahnke-Walker decision has been followed, it was followed *on its definition of interstate commerce*. In cases where it has been distinguished, the decision was based, *not* on the definition of interstate commerce, but on the fact that the tax was laid on a local privilege and did not touch interstate commerce. Not in one instance has the definition of interstate commerce, as stated in the Dahnke-Walker case, been criticized. And this Court in its latest decisions has used the definition unqualifiedly and without reserve, and with *no suggestion as to any limitation on its use*.

For example, in *Currin v. Wallace* (1939), 306 U. S. 1, the Court said (p. 10):

> "Where goods are purchased in one state for transportation to another the commerce includes the purchase quite as much as it does the transportation."

And in *United States v. Rock Royal Co-Operative* (1939), 307 U. S. 533, the Court said (pp. 568-569):

> "But where commodities are bought for use beyond state lines, the sale is a part of interstate commerce."

It is implicit in the words and form of these expressions that the Court treats the Dahnke-Walker difinition of interstate commerce as firmly imbedded in the law of the land.

This Court has expressly stated that the limitation imposed by the commerce clause applies *alike* to the state's taxing power and to other types of "interference"—which must include the various kinds of "regulations." In *Minnesota v. Blasius* (1933), 290 U. S. 1, after citing the Dahnke-Walker case and others as "illustrating the practical conception of interstate commerce as a flowing stream from one state to another, formed by a regular course of business," the Court said (pp. 8-9):

> "The States may not impose direct burdens upon interstate commerce, that is, *they may not regulate*

or restrain that which from its nature should be under the control of the one authority and be free from restriction save as it is governed in the manner that the national legislature constitutionally ordains. *This limitation applies to the exertion of the State's taxing power as well as to any other interference by the State with the essential freedom of interstate commerce.* States cannot tax interstate commerce, either by laying the tax upon the business which constitutes such commerce or the privilege of engaging in it, or *upon the receipts, as such, derived from it.*"

And as the Circuit Court of Appeals indicates in its opinion, in no instance has this Court, in determining whether interstate commerce existed or did not exist, ruled differently because the ultimate point involved related to a tax or to a regulation. Where facts like those in the Dahnke-Walker case exist, *there is* interstate commerce. The facts here make this a stronger case of interstate commerce.

In *Superior Oil Co. v. Mississippi* (1930), 280 U. S. 390, heavily relied on by petitioners, the action was by the State of Mississippi to collect a gasoline tax. The gasoline was sold by the Oil Company to packers of sea food. The transaction was complete when the gasoline was delivered at the packers' own wharf. The packers loaded the gas on their own fishing boats, carried it to fishermen in the neighborhood of Grant's Pass, Louisiana, and there sold it. The Oil Company, on making delivery to the packers at the wharf, took

back from the packers a so-called bill of lading signed by the master of the boat. This instrument recited that the oil continued to be the property of the Oil Company until delivered to packers' consignee. This was not true. Nor was there any actual consignee at the destination named in the bill of lading. The thing was simply rigged up for the purpose of trying to make interstate a transaction which was not. The seller and purchaser were both domiciled in Mississippi, and the sale, the delivery, and the payment were made in Mississippi. The pretended shipment from wharf to the fishermen was just a device to evade the tax. Mr. Justice Holmes spoke very moderately when he said "the document (bill of lading) seems to have had no other use than, as the Supreme Court of Mississippi said, to try to convert a domestic transaction into one in interstate commerce." The Court further said:

> "But here the gasoline was in the hands of the purchaser to do with as it liked, and *there was nothing that in any way committed it to sending the oil to Louisiana* except its own wishes." (28 U. S. at 395.)

In the instant case, sale of the ties was conditioned upon their being shipped to Finney, Ohio. Failure of the railroad to transport them there would have been a breach of the contracts.

Conclusion

The decision below is correct. It is fully supported by the facts and the law. There is no conflict among the circuits. There is no conflict with decisions of this Court. There is no important question of Federal law that should be decided. The petition should be denied.

Respectfully submitted,

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January 14, 1941.

APPENDIX

Statutes

Chapter 50, Indiana Acts 1933.

(Ind. Stat. Ann. (Burns) 1933, Sec. 64-2601 et seq.)

AN ACT to provide for the raising of public revenue by imposing a tax upon the receipt of gross income, to provide for the ascertainment, assessment and collection of said tax, and to provide penalties for the violation of the terms of this Act, and declaring an emergency.

Section 1. Be it enacted by the general assembly of the State of Indiana, That this Act may be cited as the "Gross Income Tax Act of 1933."

. . . .

(f) The term "gross income," except as hereinafter otherwise expressly provided, means the gross receipts of the taxpayer received as compensation for personal services, and the gross receipts of the taxpayer derived from trades, businesses or commerce, and the gross receipts proceeding or accruing from the sale of property, tangible or intangible, real or personal, or service, or any or all of the foregoing, and all receipts by reason of the investment of capital, including interest, discount, rentals, royalties, fees, commissions or other emoluments, however designated, and without any deductions on account of the costs of property sold, the cost of materials used, labor cost, interest or discount paid, or any other expense whatsoever, and without any deductions on account of losses; . . .

. . . .

Sec. 2. There is hereby imposed a tax, measured by the amount or volume of gross income, and in the amount to be determined by the application of rates on such gross income as hereinafter provided. Such tax shall be levied upon the entire gross income of all residents of the State of Indiana, and upon the gross income derived from sources within the State of Indiana, of all persons and/or companies, including banks, who are not residents of the State of Indiana, but are engaged in business in this state, or who derive gross income from sources within this state, and shall be in addition to all other taxes now or hereafter imposed with respect to particular occupations and/or activities. . . .

Sec. 3. The tax hereby provided for shall be imposed at the following rates:

. . . .

(c) Upon the entire gross income of every person engaged in the business of retailing of any tangible commodity or commodities not specifically mentioned in subsection (d) of this section, one per cent.

. . . .

Sec. 6. There shall be excepted from the gross income taxable under this Act:

(a) So much of such gross income as is derived from business conducted in commerce between this state and other states of the United States, or between this state and foreign countries, to the extent to which the State

of Indiana is prohibited from taxing under the Constitution of the United States of America. . . .

Sec. 12. (a) . . . Any person improperly charged with any tax provided for under this Act, and required to pay the same, may recover the amount improperly collected, together with interest, in any proper action or suit against the department of treasury; and the circuit court of the county in which the taxpayer resides or is located shall have original jurisdiction of any action to recover any tax improperly collected. . . .

Regulations

Promulgated by Gross Income Tax Division

July 31, 1934

Article 1

Definitions

. . . .

Reg. 6. Gross Income consists of the gross receipts as hereinafter defined, from any business, together with any other moneys (not including borrowed money) or properties received from any and all other sources and from other activities, without deduction for expenses, for costs of goods sold, or amount of property left on hand.

Reg. 7. Gross Receipts. The amount received either in money or property, or both, from a transfer of possession of any tangible or intangible property, personal

service, interest, discount, rents, royalties, bonuses, fees, commissions and other emoluments however designated.

Article 2

General Scope and Application of Tax

The Gross Income Tax Act of 1933 is primarily and in effect a gross receipt tax applying to the gross receipts of every taxpayer under the Act from all sources without allowances or deductions for costs, expenses or dependents, and is therefore, in no way a net income tax. . . .

Reg. 16. Effective Date of Law. Tax shall apply to and shall be levied and collected upon all gross income received on or after the first day of May, 1933, regardless of the fact that such income was earned or became due prior to that date.

. . . .

Article 3

Income and Rates

. . . .

Reg. 21. Income from Sales. Gross income derived from sales is taxable at the following rates:

From sales made to consumer—1% (See Reg. No. 9-c).

From sales made for resale—¼ of 1% (See Reg. No. 9-d).